IN THE

Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

MARTHA C. REED, by her attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 17, 1955.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in — Fed. 2d — (C. A. 3, 1955). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the defendant affirming

the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the complaint herein. Chief Judge Biggs dissented.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1955. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where the undisputed facts reveal that the duties of an office employee of an interstate railroad require her to fill orders from all the shops of its 12-state system by going among files containing 325,000 original tracings of the entire mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage of said system, locating the necessary tracings, delivering them to printmakers for duplication into working blueprints for the shops of the entire system, and thereafter replacing the said tracings in their proper places, is not the Court of Appeals, which is in conflict with this Court, itself, other Courts of Appeals, and state courts of last resort, arbitrarily and capriciously in error in holding that such employee was not within the purview of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51, on grounds that her duties neither further nor directly closely and substantially affect interstate commerce?

2. Is not the Court of Appeals in error in so construing the 1939 Amendment to the Federal Employers' Liability Act, 45 U. S. C. Section 51 [Aug. 11, 1939, c. 685, 53 Stat. 1404], as to differentiate between office workers and employees engaged in actual transportation, and also between the relative importance of employees' positions as affecting transportation?

THE STATUTE INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

On July 15, 1951 while the petitioner, Martha C. Reed, was in the drafting room on the 5th floor of the respondent's 32nd Street Building in Philadelphia, Pa., one of the windows which for a long time had been cracked diagonally from top to bottom blew in upon her, causing her serious personal injuries (30a, 31a).

At the time of the aforesaid accident, the petitioner was employed by the respondent as a "print maker" at the aforesaid building (22a). Her duties consisted of filing original structural tracings of tracks, cars, engines and parts therefor (19a). The department in which the petitioner was employed had approximately 325,000 original tracings on file (20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all other types of structures including bridges and trackage (23a). The respondent's entire system is embraced within the blueprints made from the trac-

ings; that is, its entire physical plant which is found in Pennsylvania, Michigan, New York, New Jersey, Delaware, Maryland, Washington, D. C., Ohio, Indiana, Illinois and Missouri (20a). The 32nd Street Building where petitioner worked is the only place on respondent's entire system where these tracings are kept or where prints are made (14a, 20a).

Approximately 67% of the blueprints are sent by the respondent to shops in states other than Pennsylvania (20a). The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a), and the blueprints go to wherever the respondent runs (47a).

The shops in the respondent's system which are engaged in keeping the system operating send in orders (27a) for blueprints from which they conduct their operations. The petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by going from file to file (23a), locating the necessary tracings and delivering them to the print makers for duplication (28a). It is also her function and responsibility to replace in their proper places the original tracings when they have been duplicated (28a).

The complaint in this case was filed July 23, 1953 (1a). The petitioner's deposition was taken on September 10, 1953 (21a). Almost a year and a half later the respondent moved to dismiss the action on the ground that the petitioner's claim was not within the Federal Employers' Liability Act and there was no other ground for federal jurisdiction (55a, 56a). On March 17, 1955 an Order was entered by Chief Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania, dismissing the action with costs (59a).

On appeal to the United States Court of Appeals for the Third Circuit, judgment was entered for the respondent-defendant upon the unwarranted ground that the Fed-

eral Employers' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65] as amended by the 1939 Amendment [53 Stat. 1404 (1939), 45 U. S. C. § 51 (1952)] was not broad enough to cover this case.

Chief Judge Biggs of the United States Court of Appeals for the Third Circuit dissented from the decision on grounds that petitioner-plaintiff's duties furthered interstate commerce and as such fell within the purview of the aforesaid 1939 amendment. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a short statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. *Southern Pacific v. Gileo; Southern Pacific v. Moreno; Southern Pacific v. Aranda; Southern Pacific v. Eufrazia; Southern Pacific v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257 which are now awaiting decision in this Court present the same large and novel question as the case at bar—the scope of the 1939 Amendment to the Federal Employers' Liability Act. The facts at bar would place before the Court that large occupational grouping which, along with the *Gileo* cases, would present a rounded set of job-types from which a full and much needed answer to the question can be formulated.

2. This decision is in conflict with the decision of this Court in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947).

3. This decision is in conflict with the decision of the same Court of Appeals in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955).

4. This decision is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Thomas v. Union Railway Co.*, 216 F. 2d 18 (C. A. 6, 1954).

5. This decision is in conflict with decisions of the state courts of last resort in *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952); *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

6. A definitive survey of the bounds of said 1939 Amendment is necessary to determine which of the exclusively alternative remedies of state workmen's compensation or Federal Employers' Liability Act right of action is available to large numbers of carrier employees since their redress for industrial accidents has now been rendered uncertain by this decision of the majority of the United States Court of Appeals for the Third Circuit.

7. This decision, unless corrected, will inevitably and rapidly generate a flood of additional litigation and appeals on the separate issue of interstate commerce in most suits under the Federal Employers' Liability Act.

ARGUMENT.

Point I.

Petitioner's Duties as Respondent's Employee Were the Furtherance of Interstate Commerce, and They Directly or Closely and Substantially Affected Such Commerce in the Authoritative Sense of Those Terms. She Is Therefore Within the Ambit of 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].

One of the two major sources of error in the decision of the majority of the Court of Appeals is fundamentally definitional and arises from its barren answer to the crucial question of what is meant by "interstate commerce" as used in the 1939 Amendment to the Federal Employers' Liability Act.

The majority has suggested in footnote 10 of its opinion that interstate commerce under the Act is interstate "transportation" as such, thereby placing itself in direct conflict with *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); and *Ericksen v. Southern Pacific Co.*, 234 P. 2d 279 (Cal., 1951). "Indeed", it states, "the interstate commerce involved in railroading is transportation", citing therefor portions of S. Rep. No. 661, 76th Cong. 1st Sess. 2, 3 (1939) [1] (at page 30).

We have exhausted the legislative history of the provision of the 1939 Amendment in issue in this case, and a thorough reading of it reveals how completely useless it is as an aid in resolving the issue at bar. For instance, the very document relied upon by the majority in its footnote 10 as a basis for its holding that commerce is transportation contains material, not mentioned by the majority,

1. At this printing the opinion of the Court of Appeals is not officially reported. All subsequent references thereto are to the opinion as paginated in the "Appendix" *infra*.

which negatives the inference drawn by the majority and supports the construction we urge. For instance, S. Rep., No. 661, 76th Cong., 1st Sess. 2, 3 provides, *inter alia:*

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to *employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.*" (Emphasis supplied.)

So too the majority, in drawing its conclusion about the scope of the Amendment, quotes from and obviously relies heavily upon certain testimony which Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, gave before the Sub-Committee of the Senate Committee considering the then proposed Amendment.

It is far from clear to us why the majority leans upon that testimony in view of Mr. McGrath's later testimony (also unquoted by the majority) at the same hearings that:

> "I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone."[2]

In the light of Mr. McGrath's most frank admission, why does the majority quote him to answer the question at the very heart of this case: How much did the 1939 Amendment enlarge the coverage of the Act? The answer must lie in areas more authoritative than this kind of completely inconclusive legislative history.

Assuming *pro arguendo* that transportation is the commerce contemplated by Congress in the enactment of the 1939 Amendment, was any part of petitioner's duties, in the

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2. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939). This is, of course, the same document cited in the majority opinion's footnote 8.

language of the Amendment "the furtherance of interstate or foreign commerce (read: transportation); or . . . [did any part] in any way directly or closely and substantially affect such commerce" (read: transportation)?

Having said that the contemplated commerce is transportation, the majority of the Court of Appeals then leaves the matter there. But this, of course, is fruitless tautology since the substitution of one term for another merely begs the question: What is transportation? One looks in vain for the Court's express answer to the question so squarely raised by the substitution of terms.

In all candor, we must ask: is there a difference in the meaning of these terms interstate commerce and transportation?

We urge that a difference there is. It is substantial and the cases in which the terms have been used underscore that difference. In essence it is one of the breadth of concept of the scope of the 1939 Amendment. If the cases are read with a view toward this differentiation it becomes apparent that there are two conflicting views of the effect of the 1939 Amendment.

One view is symbolized by the term "interstate transportation" which has really been used by the majority of the Court of Appeals as a designation of the employee's physical proximity to the classical stuff of railroading: throbbing pistons, the hiss of air in a brake assembly, rattling couplers and rolling stock on flashing rails. Were this view articulated, it would state that to be engaged in interstate transportation is to be physically near and quite directly in actual contact with the materiel which makes the haul.

If the majority's opinion is read with such a premise in mind, it is very clear that the opinion evolves in a manner totally consistent with that premise. Note, for instance, that "transportation" replaces "commerce" and is then left undefined. What is the purpose of substituting terms if it does not advance the meaning of either of them? But

observe that "transportation" has much more the flavor of railroading than "commerce".

In the same mood, the majority raises and then disposes of various examples of employees—the copy writer; printer; typist in the President's office or the clerk who makes out the checks—by stating "Yet all this is a far cry from transportation" (at page 30). Is it? How can that be said until the meaning of "transportation" is known? However, a definition is never expressly laid down by the majority. Nonetheless, that parade of carrier personnel could be summarily excluded without difficulty or hesitation from Federal Employers' Liability Act coverage if this truncated view of the 1939 Amendment were adopted. Obviously that has been done. Note that the majority views with alarm the dictionary application of the word "furtherance" for it would "sweep all employees of interstate railroads into the group covered by the statute" (at page 30). Its concern for this result is generated by the set of symbols of the aforementioned group of workers not a single one of whom is begrimed with railroad soot.

The clinching justification for urging this as the majority's unstated premise is its remarkable reversal of the holding of the same Court in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955) a detailed comparative analysis of which appears *infra* under Point II. As we shall indicate the *Straub* case, which also involved a white-collar worker, presented a set of facts considerably more attenuated than those at bar, yet they properly yielded Federal Employers' Liability Act coverage while the present facts are held not to. In its withdrawal from the correct holding of the *Straub* case and the authorities grounding that decision, the majority has created a dissonance which simply cannot be harmonized by asserting that these are *ad hoc* adjudications. In fact, the present decision represents a major shift in the Third Circuit's theory of the scope of the 1939 Amendment.

This view of the 1939 Amendment simply has no foundation. The disposition apparently rests on nothing but *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947) which is at least subject to the fair observation that it is factually unrelated to this case except that both plaintiffs are office workers. As we indicate in Point II, that fact alone should be immaterial.

Furthermore, the unstated premise which permeates the majority's opinion runs throughout the *Holl* opinion: a view that the 1939 Amendment simply could not encompass the white-collar worker. Note, for instance, the language at page 23 of the *Holl* case:

> "If [plaintiff] comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. *And so, for that matter, does every other clerical employee in the department.* I do not think that it was the intention of the Congress to include *such employees* and to withdraw them from the protection of State Employer's Liability Laws." (Emphasis supplied.)

A fair paraphrase of this language is that a clerical employee, *as such,* cannot fall within the 1939 Amendment, for the Court simply excludes "such employees" without so much as qualifying its blanket conclusion with the real contingency that others of "such employees" may have duties fulfilling either of the disjunctive clauses of the 1939 Amendment. But this contingency simply cannot exist if the "transportation" view of commerce is applied. Indeed, that Court, as the majority here, never has to go into the question of the true nature of the employee's duties.

The *Holl* Court continues at page 23:

> "On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in*

> *such commerce.'* This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, **whether their work be clerical or not**, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier.* (Boldface emphasis supplied.)

The boldface emphasis: "whether their work be clerical or not" is, we respectfully submit, a complete confirmation that it is the "workshirt" view of the 1939 Amendment to which the *Holl* Court subscribes. It is clerical work *qua* clerical work which that Court simply cannot subsume in its theory of the Act.

As if this were not proof enough of that Court's unstated premise, observe its catalogue of cases at page 24 of the opinion as to which the Court states at page 24:

> "It is quite evident that each of the employees just mentioned, whether *switchman, brakeman, trackman, repairman, or oilman*, was performing a function connected directly with, or which affected, interstate commerce. Each was doing something in furtherance of interstate commerce, whether he was assisting in the preparation or preservation of *rolling stock, equipment, roadbeds, instrumentalities, accessories or materials* used for repairs. And each was furthering, i.e., *promoting* or helping along, present or future interstate commerce. (First two emphases supplied.)

Without exception, these examples have the full flavor of railroading in the literal, constricted sense of the term.

Note finally the Court's emphasis on the word "promoting" as a synonym for "furthering". This was one of the words (i.e., "promotion"), that the majority of the Court of Appeals fled from because it felt that an application of a dictionary term such as this "will sweep all em-

ployees of interstate railroads into the group covered by the statute".

We submit that the same erroneous unstated premise which runs through the majority opinion infects the *Holl* opinion as well. Together, these cases conflict markedly with the remedial intent of the 1939 Amendment and indeed with respect to the word "promotion" they are at war with each other.

The holdings in *Straub v. Reading Co., supra,* and *Lillie v. Thompson,* 332 U. S. 459, 68 S. Ct. 140 (1947) show without doubt that a white collar is no bar to Federal Employers' Liability Act coverage. See also *Bowers v. Wabash Railroad,* 246 S. W. 2d 535 (Mo. App. 1952) and *Thomas v. Union Railway Co.,* 216 F. 2d 18 (C. A. 6, 1954). All of these cases were cited in the appeal below, but appear to have had no effect in preventing the majority from indulging this pinched theory of the 1939 Amendment.

In sharp contradistinction to the "interstate transportation" concept is the great weight of authority hewing to the "interstate commerce" theory the essence of which is that coverage under the 1939 Amendment is circumscribed not by a ribbon of rails, but by that totality of carrier employees' work processes which result in the interstate movement of men and goods on those rails.

Unlike the majority's view of the 1939 Amendment, the concept finds nothing inherently difficult about covering the white-collar job under the Amendment since it is not physical proximity to a roadbed but the nature of the work process which sets the limits of coverage. Thus, under this theory of the Act, it is perfectly conceivable and indeed the Act contemplates that a "clerical" worker can have duties which, in the language of the 1939 Amendment, "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce."

If, as we submit, these are significantly dissimilar and conflicting theories of the scope of the 1939 Amendment,

then it is of great importance both to the Third Circuit and courts throughout the nation to determine from more authoritative sources than those suggested by the majority which of these conflicting views is justified by the intent of Congress in its enactment of the 1939 Amendment. (And, of course, so long as the differences are exposed, it ultimately matters not how the views are labeled: commerce equals transportation or commerce equals commerce.)

We respectfully urge that the latter full view of the 1939 Amendment is the only one consonant with Congressional intent. It is now long-settled law that the 1939 Amendment was a great broadening of the FELA, eliminating as it did the old "moment of injury" test and the "intimate and integral part" of interstate transportation view of the Act. *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); *Southern Pacific Co. v. Industrial Accident Commission*, 19 Cal. 2d 271, 120 P. 2d 880 (1942). The backshop cases[3] can only be explained by this ex-

3. Harris v. Missouri Pac. R. Co., 158 Kan. 679, 149 P. 2d 342 (1944); Trucco v. Erie R. Co., 353 Pa. 320, 45 A. 2d 20 (1946); Jordan v. Baltimore and Ohio Railroad Company, 62 S. E. 2d 806 (1950); Baltimore and Ohio Railroad Company v. Rodeheaver, 81 A. 2d 63 (1951); McGuigan v. S. Pac., 247 P. 2d 415 (1952); Baird, et al. v. New York Central R. R., 86 N. E. 2d 567 (N. Y. 1949); Wills v. Terminal R. R. Ass'n. of St. Louis, 239 Mo. App. 1144, 205 S. E. 2d 942 (St. Louis Court of Appeals, 1947); Pauley v. McCarthy, 166 P. 2d 501 (Utah, 1946); Murphy v. Boston and Maine R. R., 65 N. E. 2d 923 (Illinois, 1946); Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062 (1943); Ermin v. P. R. R., 36 F. Supp. 936, 940 (D. C. E. D. N. Y., 1941); Ernhart v Elgin J. & E. Ry. Co., 84 N. E. 2d 868, 337 Ill. App. 56 (Ill., 1949); affirmed 92 N. E. 2d 96, 405 Ill. 577; Prader v. P. R. R., 49 N. E. 2d 387 (Ind., 1943); Rainwater v. Chicago, R. I. & P. Ry. Co., 21 So. 2d 872 (La., 1945); Agostino v. P. R. R., 50 F. Supp. 726 (D.C.E.D.N.Y., 1943); Albright v. P. R. R., 37 A. 2d 870 (Md., 1944), cert. den. 323 U. S. 735, 65 S. Ct. 72; Desper v. Starved Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216 (Ill., 1952); Scarborough v. P. R. R., 154 Pa. Super. 129 (1943); Wright v. New York Central Railroad Co., 33 N. Y. Supp. 2d 531 (N. Y., 1942); Edwards v. Baltimore & Ohio Railroad Co., 131 F. 2d 366 (C. C. A. 7, 1942); Cheffey v. P. R. R., 79 F. Supp. 252 (D. C. E. D. Pa., 1948).

panded ambit of the Statute. The restricted concept of coverage effected by the majority of the Court of Appeals in the case at bar is an unauthorized surgery upon the 1939 Amendment which, if permitted to go uncorrected by this Court, will leave a misshapen statute which Congress never intended.

The unwarranted excision appears very clearly in the majority's opinion. It notes, initially, that "the two clauses [in the 1939 Amendment] are in the disjunctive." Many FELA cases, exemplified by *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954), substantiate that construction.

But the majority thereafter refuses to reason to the conclusion to which those disjunctive phrases lead. Having observed the dictionary definitions of the word "furtherance", the majority will not apply them accordingly for fear "that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute". Is there something amiss with such an effect in the light of Chief Judge Biggs' accurately dissenting observation at page 35?

> "As was pointed out by the Superior Court of Pennsylvania, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605 (1944), the amending language is very comprehensive, so inclusive indeed that most railroad employees come within its scope. Such a result may be unfortunate but seems to have been the intention of Congress."

Beyond this, the former Acting Solicitor General of the United States, Robert L. Stern, Esq. observes in his 1955 Ross Prize Essay, "The Scope of the Phrase Interstate Commerce", 41 A. B. A. L. J. 823, 873 (Sept. 1955):

> "Use of the phrase 'interstate commerce' [in certain other statutes], however, affords no basis for changing the meaning of the constitutional expression. Since such statutes do not exhaust Congress' constitutional

authority, Congress has ample power to expand or contract statutory coverage by amendment, without redefining the constitutional phrase. That was what happened to the Federal Employers' Liability Act, which originally applied only to injuries to employees engaged in interstate commerce [citation]... The over-refinements [citation] which resulted from judicial interpretation of that phrase [citation] led to the replacement of the 'in commerce' test by language which covered *all* railroad employees [citation]." (Emphasis supplied.)

Having refused to apply the "furtherance" clause as it was intended, the majority holds that " 'furtherance' was meant to cover those in the actual business of transportation itself and the second clause was to cover the fringes" (at page 31).

We have identified the "transportation" theory for what it really is and find no sound basis either for that view of the scope of the Amendment or the majority's construction that the second clause was the broader of the two because it "was to cover the fringes", for as Chief Judge Biggs properly notes in effect in his dissent, the disjunctives are alternative modes of qualifying for coverage. There is no authoritative reason for holding that one clause is broader than the other.

The majority's reading not only runs afoul of settled authorities, but is grossly inadequate on its own terms. Even if we assume *pro arguendo* that that construction of "commerce" is justified, immediate and fatal difficulties arise. It must follow that if "the actual business of transportation" itself were the limitation of the first clause that the majority says it is, then the "fringes" meant to be covered by the second clause, touch or involve something in addition to, beyond, or other than such transportation. What is it? By what legal standards are injured carrier employees' rights now to be determined under this view of the 1939 Amendment?

If something other than or beyond "the actual business of transportation" is comprehended by the second clause, to what do that clause's words "in any way . . . affect such commerce" refer? Grammatically, what is "such commerce" if not the alleged "actual business of transportation"? And yet, logically, this cannot be for the majority has said that the phrase from which it comes is broader than the referent first disjunctive phrase "such commerce".

We earnestly submit that grammatically, logically and historically the interpretation is embarrassing and patently impossible. If it is allowed to stand, it must breed widespread confusion, uncertainty and unnecessary litigation and appeals. The disorder will hobble a set of, until now, clear and effective remedies for the class intended to be covered by the remedial legislation of the 1939 Amendment.

Point II.

A Carrier Employee's Job Function, and Not the Relative Importance of His Work or Status, Is the Sole Determinant of Coverage Under 45 U. S. C. Section 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].

As indicated *supra*, the opinion of the majority of the Court of Appeals places an erroneous construction upon 45 U. S. C. Section 51. An accurate construction renders the effective coverage of the 1939 Amendment much broader than the majority was willing to recognize thus insuring that carrier employees shall have available to them the remedies Congress intended they have.

As we have argued, the error of the majority arises from unwarranted statutory construction. The other source of error is in an area where two distinct and unrelated sets of inferences can be drawn from the same set of facts in a case such as this; *inferences of job status and inferences of job function.*

The large and legally irrelevant inference used both by the respondent and the majority in the opinion of the Court of Appeals is that petitioner's job is a relatively unimportant one in the hierarchy of railroad affairs, and the majority of Court seems further concerned by the fact that petitioner is an office worker (see its analogizing examples covering only office workers). These are inferences of status and importance and have with utterly no justification been made one of the legal bases for excluding petitioner from the coverage of the 1939 Amendment to the F. E. L. A.

In his dissent from the Court of Appeals' decision, Chief Judge Biggs fixed upon this when he stated at pages 34-35.

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also *between the relative importance of employees' positions as affecting transportation.*" (Emphasis supplied.)

In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of "a messenger boy" at the end of a "dire chain of catastrophe" and remarking "One is reminded of the old rhyme 'for want of a nail the shoe was lost' " (at page 33).

It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment. But the majority, having been correctly reminded of the adage, summarily abandons it and proceeds to the bald assertion, resting on no explicitly reasoned grounds whatsoever, that this case is not covered by the Act.

The "chain of catastrophe" in the old rhyme is a chain of functional relationships, and not some Dantean chain of status in which the petitioner-file clerk is placed one posi-

tion above the messenger boy. The moral of the story is that the battle was lost not because a *private* set off the chain of catastrophe but because the *want of a nail* did. Of what analytical value is the analogy to this case unless it be to the question of the functional relationship of petitioner to interstate commerce? And if that is its intellectual purpose, the fact that the majority of the Court of Appeals abandoned the analysis at the very moment it so productively suggested it is a further indication that a functional analysis was never applied to the facts at bar.

It is our position that the only valid inference to which an inquiry on such facts should be directed is one of *function*. Once the analogy suggested by the majority is posed, there arises the question of petitioner's duties and its answer points clearly to a conclusion of coverage under the Act.

We may designate petitioner a mere file clerk, messenger or by any other job classification. But what in truth are her *duties?* She is indeed engaged in important work which is rendered no less important by the somewhat drab title her job carries. Importance aside (as it should be) the critical fact is that her duties are related to interstate commerce in all those respects comprehended by 45 U. S. C., Section 51.

Petitioner was employed in a department in which approximately 325,000 original tracings were on file (20a). This was the only office in which original tracings were filed (14a, 20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage (23a). This was the only place in respondent's system in which the blueprints were made (14a, 20a). Respondent's entire system is embraced within the blueprints made from the tracings. The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a). Blueprints go to wherever respondent runs (47a). It runs through at least twelve states (20a).

Approximately 67% of the prints are sent beyond Pennsylvania's state line (20a).

It is clear that the master sheets and the blueprints made from them have a direct connection with, and effect upon, interstate commerce. The railroad's interstate system almost literally runs on those documents. From them the respondent's physical plant has been built. Its tracks, bridges and rolling stock are their end product and unquestionably are kept in operation through their continual use in the construction of new equipment and the repair and replacement of worn and broken gear, equipment, cars, locomotives, trackage, depots, power houses and the like. Without them the respondent could never have gone in operation as an interstate carrier and it could not long continue in the stream of interstate commerce were they destroyed or rendered useless or not subject to constant reference for maintenance and repair.

It is in this context that the petitioner, a "file clerk", works. And what precisely is her function? The shops in respondent's system, which are engaged in keeping the system operating, send in orders (27a) for blue prints from which they conduct their operations. Petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by running around from file to file (23a) locating the necessary tracings and delivering them to the printmakers for duplication (28a). It is also her function to replace the original tracings when they have been duplicated (28a).

Thus, it appears that until the tracings are taken out of the dead storage of a file cabinet by someone who knows their location and can get them when they are needed, the tracings are of no use to anyone. It should also be apparent that unless they are accurately replaced in their proper niches, confusion, delay and worse may result when they are needed again by the railroad's shops. Without the tracings the new prints cannot be made. Without the

prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as "dismal" (at page 33).

When seen in this perspective, petitioner's title of "file clerk" tells little if any of the full story of her actual role. The work she does is necessary, vital and important. But these qualities, of themselves, do not necessarily bring her within the ambit of the Federal Employers' Liability Act. We must look to see whether these duties, or any part thereof, "shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially affect such commerce . . ." as the Act requires.

It is our position based upon the reasoning of this Court in *Overstreet v. North Shore Corporation,* 318 U. S. 125, 63 S. Ct. 494 (1943) that a simple, direct and workable test to determine whether these elements are met here lies in the question: "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?" This is but the other side of the 1939 Amendment to the Federal Employers' Liability Act. Eliminate petitioner's function and the answer must be in the affirmative. It does not matter what we call her job. By any title, or no title, were that function eliminated or improperly performed, the vital tracings would not then get up and walk out of the file drawers in which they repose. And so long as they remain there, the prints duplicated from them would never get to the shops which keep the system operating in interstate commerce. Someone must perform this function, else there would unquestionably be an impediment and delay to the furtherance of interstate commerce and an impediment directly, closely and substantially affecting the furtherance of such commerce. Just as the hostler takes the locomotive from the roundhouse to the running tracks, so petitioner takes the tracings from the files to the main-

tenance, repair and construction shops and jobs. Hers is a necessary step. She is a necessary cog.

There can be no doubt that a riveter who drills a hole in an engine is covered. The man who carries the rivet is also certainly covered. Can it possibly matter whether he carries a rivet, a blueprint or a tracing? The important thing is that each is performing a function necessary to interstate commerce. Petitioner here was performing work just as necessary to interstate commerce as the man who carries the blueprint for the riveter and is, therefore, just as he, covered by the Act.

Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act.

Notwithstanding this argument and the analysis upon which it is based, the majority of the Court of Appeals has stated at page 33:

> "We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact."

No such test has been sought of that Court. Petitioner is well aware that the scope of the 1939 Amendment is not a matter of logarithmic certainty. However, to say this is not to concede what in effect has been laid down by the majority of the Court of Appeals as the basis for adjudication: a necessarily arbitrary *ad hoc* disposition resting on no discernible reasoning except a desire to shrink the limits of 1939 Amendment previously and properly author-

ized by the very same Court of Appeals, and virtually every other court in the country.

An examination of the majority's opinion reveals this is not an overstatement of the case. The gist of its adjudication on the facts at bar and the precise point at which it generated intra- and inter-circuit conflicts is found at page 33 where the Court said:

> "We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Company*, 220 F. 2d 177, 183 (3rd Cir. 1953), that we had a 'borderline' case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here."

If we assume the broad and accurate view of the 1939 Amendment, this quoted portion of the opinion is remarkable, for the facts of the *Straub* case actually extend much closer to the limits of the 1939 Amendment than those of the case at bar. If the construction of the 1939 Amendment previously proposed by the majority is assumed, then the *Straub* case is utterly inexplicable. From the present facts, much less attenuated coverage-wise than *Straub*, the same Court has drawn an opposite conclusion stating simply "That is closer and more substantial than the plaintiff's connection here." Why? Surely the mere statement does not make it so.

It is equally certain that upon an analysis such as that laid down in *Overstreet v. North Shore Corp., supra*, there should be no question that without Straub's functions, the net impact upon interstate commerce would be reflected much more slowly and indirectly than the withdrawal or confusion of petitioner's duties. Straub's duties as assistant timekeeper were "to prevent payroll padding and

to ensure appellant's compliance with the Federal Hours of Service Law" (at page 183). Without the execution of such duties, it is perfectly conceivable that there might be no directly appreciable effect on interstate commerce. That is, employees overseen by Straub might neither pad the payrolls nor work more than sixteen consecutive hours, and even if there were padding and overwork there would still remain the question of what the proximate net effect upon interstate commerce would be. In saying this, we are in no sense questioning the correctness of the *Straub* decision which we respectfully submit was properly decided for reasons we urged upon the Court of Appeals in the argument of that case.

But on the facts at bar, the tracings would not get out of these files unless they were taken therefrom nor would they return unless placed therein. They would not position themselves properly. In a real sense, Straub's duties might be executed by those of his overseen employees who had neither the desire to pad pay rolls nor work beyond the designated time. But here no such execution of petitioner's duties by others is possible. Either she prosecutes them or her work does not get done. And if that work is not done the effect is felt directly, immediately and effectively all through the stream of interstate commerce.

What then can be the rationale for the majority's conclusion that Straub's duties are "closer and more substantial than the plaintiff's connection here?" The explanation must lie in Chief Judge Biggs' cogent observation at pages 34-35 that:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of employees' positions as affecting transportation."

For the reasons stated both in Point I, *supra*, and the discussion herein, neither of these differentiations is jus-

tified under the statute. The decision of the majority of the Court of Appeals is a completely erroneous and arbitrary adjudication upon the facts at bar, and is a clearly unauthorized disfigurement of the 1939 Amendment. If not corrected by this Court it can only confound the application of a statute whose integrity demands decisional uniformity and broad, undiminished scope.

The opinion of the majority represents the latest and most significant attempt to shrink the coverage of the FELA. It thereby strips countless numbers of interstate carrier employees of rights which Congress meant to be secured by the enactment of the 1939 Amendment to the FELA. Until the emasculating decisions of the Court of Appeals and the *Holl* court had been rendered, it was thought that the "transportation" argument had been permanently discredited by cases such as *McFadden v. Pennsylvania R. Co., supra*, and the many back-shop cases following it.

Subsequent attempts to chop away at the FELA came in the form of a challenge that the repair was not being made *directly* to an artery of interstate commerce. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) stopped that attempt to impair the effect of the FELA There followed another effort to narrow the scope of the FELA through the argument that only persons engaged in physical labor were protected by the Act. This, too, failed, *Straub v. Reading Company, supra.*

Once again, the threat of unauthorized statutory surgery is posed by the decision of the Court of Appeals.

With the cases of *Southern Pacific v. Gileo, et al.*, (Docket No. 257) now awaiting argument before this Court, there has finally been raised in this forum the question of the scope of the 1939 Amendment. The facts of those cases embrace backshop workers. The other large area ripe for the consideration of this Court is symbolized by petitioner's job as an office worker. We respectfully submit that like the backshop worker, the office worker such as petitioner is within the coverage of the FELA, for the

proper test should indifferently comprehend all places of work in a carrier's system, and all ranks of personnel. It should look solely to the true nature of the employee's job function.

By granting certiorari in this case the Court would have a full set of cases and comprehensive facts so that at one time the much-needed authoritative construction of the scope of the 1939 Amendment could be roundly drawn. In so doing, the palpable error of the decision of the United States Court of Appeals could be erased, confusion both within and without that Circuit corrected and avoided in future rulings in this vast and important field of law. Not to grant certiorari and reverse here means an avalanche of cases litigated as to coverage which will crowd our courts with all the uncertainties of the nightmarish pre-1939 days. See the host of pre-1939 cases annotated at 45 U. S. C. A. § 51 [1954 ed.], notes 263, 1116, 1117, 1118.

CONCLUSION.

Petitioner's duties fell squarely within the scope of the 1939 Amendment to 45 U. S. C., Section 51 in the authoritative sense in which the Amendment has been construed and applied. By affirming the judgment of the District Court dismissing the complaint herein, the Court of Appeals has thus committed serious error which, if uncorrected by this Court, will deprive the petitioner of rights vouchsafed by a solemn act of Congress, ramify into a grave distortion and confusion in the interpretation and application of the FELA in courts across the entire nation, and deprive countless other employees of interstate carriers of the benefits of this remedial legislation.

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,600

MARTHA C. REED,

Appellant

v.

PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 7, 1955

Before BIGGS, *Chief Judge*, and MARIS and GOODRICH, *Circuit Judges*.

OPINION OF THE COURT
(Filed November 17, 1955)

By GOODRICH, Circuit Judge.

This case involves the application of the Federal Employers' Liability Act [1] and its 1939 amendment.[2]

The plaintiff was injured when a window in the Thirty-Second Street office building of the Pennsylvania Railroad blew in upon her during a storm. She was at the time engaged in her work for the Pennsylvania. Her job was to serve as custodian of the files of master sheets from which blueprints were made. The subject matter of the blueprints was any part of locomotives, freight cars or other things used in the business of railroading. When an order came from some point on the railroad's system asking for a blueprint of one of the tracings in the file, it was plaintiff's task to find the tracing there and take it to the blueprint maker, returning the tracing to the files when the blueprint maker was through with it. There is no substantial dispute on the facts. The sole question involved in the case is whether this plaintiff, when injured during the performance of her duties for the railroad, is within the scope of the Federal Employers' Liability Act and its amendment.[3]

The language which must be looked at is that of the 1939 amendment to the statute. The history of the original statute of 1906 and its 1908 successor does not need to be discussed at length here. The 1906 act was considered by the Supreme Court to have gone too far and was declared unconstitutional.[4] The 1908 statute was designed to

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1 35 STAT. 65 (1908), as amended, 45 U.S.C. § 51-60 (1952).

2 53 STAT. 1404 (1939); 45 U.S.C. § 51, 54, 56, 60 (1952).

3 Answering this question in the negative, the court below granted defendant's motion to dismiss. Reed v. Pennsylvania R. R. Co., Civil No. 15591, E.D. Pa., March 17, 1955.

4 The Employers' Liability Cases, 207 U.S. 463 (1908).

meet the constitutional difficulties which the Court had considered in the 1906 act.[5] Many cases were decided under the 1908 act. They can be summarized sufficiently accurately for the discussion here by saying that what was required was "on the spot" participation in transportation.[6]

The 1939 amendment was designed to enlarge the coverage of the act.[7] How much did it enlarge it? Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption:

> "Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . . .*" (Italics ours.)[8]

The pertinent language of the amendment [53 STAT. 1404 (1939), 45 U.S.C. § 51 (1952)] says:

> "Any employee of a carrier, *any part of whose duties* as such employee *shall be the furtherance of interstate or foreign commerce;* or shall, *in any way directly or closely and substantially, affect such commerce* as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Italics ours.)

It is to be noted that the two clauses are in the disjunctive. Each contains language from which one can get out

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5 Second Employers' Liability Cases, 223 U.S. 1, 51 (1912).

6 See, *e.g.*, Shanks v. Delaware, Lack. & West. R. R., 239 U.S. 556, 558 (1916), where the test was held to be whether "the employé at the time of the injury [was] engaged in interstate transportation or in work so closely related to it as to be practically a part of it . . ."

7 Robinson v. Pennsylvania R. R. Co., 214 F.2d 798, 799 (3rd Cir. 1954).

8 *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess., on S. 1708, at 8 (1939).

as much as he cares to put in it. Take the word "furtherance," for instance, in the first clause. If one looks up furtherance in the dictionary he finds it is defined as "the act of helping forward," "promotion," "advancement," "progress."[9] It is quite clear, is it not, that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute. Take the copy writer who is penning an advertisement of the beauties of travel on the Broadway Limited on its trip from New York to Chicago and who suffers injuries when his desk chair collapses. Certainly the very object of his word painting is the promotion of more passenger business for the Pennsylvania on its crack interstate train. The same thing is true, is it not, of the printer who sets up the type or tends the press on the timetables for the Pennsylvania's interstate trains. His product is to help business by telling passengers when to get on trains and when to get off. Yet all this is a far cry from transportation itself;[10] as much so as the typist in the president's office who writes a letter on a railroad matter, or the clerk who makes out the checks for the treasurer to sign.

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9 WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. unabr. 1941).

10 Relying on McFadden v. Pennsylvania R. R. Co., 130 N.J.L. 601, 34 A.2d 221 (1943), appellant argues that under the amendment the employee's relationship to interstate commerce, rather than interstate transportation, is controlling. Yet she fails to point to any effect which her duties might have had on an aspect of interstate commerce other than interstate transportation. Indeed the interstate commerce involved in railroading is transportation. The Senate committee report indicates that the attention of the legislators was on transportation and transportation employees.

"This amendment is intended to broaden the scope of the Employer's Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are con-

If "furtherance" means in the statute everything that its dictionary listings include, the second clause of the section is meaningless repetition. The whole field has been covered already. In view of the constitutional difficulties which the legislators found in the "affect" phrase, and the limitations they placed upon it, to be discussed in a moment, it is incredible to conclude that they were intending a scope for the first clause which is as broad as all out of doors. It is much more likely that the second clause is the broader and that "furtherance" was meant to cover those in the actual business of transportation itself [11] and the second clause was to cover the fringes.

We come then to the second clause in the amendment which brings in an employee whose duties either "directly" or "closely and substantially" affect interstate commerce.

This language had a very interesting legislative history. The first proposal made in the Senate bill was to have the coverage of every employee whose work "in any way affected" interstate commerce. This was later modified to meet what was at the time thought to be a constitutional difficulty and the "directly" or "closely and substantially" modification appeared in the final bill.[12] That

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stantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." S. REP. No. 661, 76th Cong., 1st Sess. 2, 3 (1939).

11 It would appear that the "furtherance" clause was included to codify certain holdings under the 1908 statute. See, *e.g.*, Hines v. Wicks, 220 S.W. 581 (Tex. Civ. App. 1920), where it was held that an employee hauling out of state baggage from a train to a baggage room was furthering interstate transportation and within the limited coverage of the 1908 act. See also, Antonio v. Pennsylvania R. R. Co., 155 Pa. Super. 277, 38 A.2d 705 (1944).

12 During the hearings, Senator Austin said, in support of his motion to make the substitution:

["Directly" or "closely and substantially"] "occur and recur in many cases of recent date as defining what kind of effect on interstate is comprehended by the commerce clause of the Constitution. . . .

"[They embody] the law as it is interpreted by the Supreme Court of the United States in National Labor Relations Board against Jones &

a broader reading of the then recently decided Labor Relations Act case would have indicated to the draftsmen that a constitutional difficulty did not exist,[13] is immaterial. They did not so interpret it.[14] Instead they left to courts the problem of what is "directly" or "closely and substantially."

We need not worry much about the "directly" part of the clause. What is direct is not entirely sun-clear but is much easier to categorize than the second phrase, "closely and substantially."

In trying to decide what these words mean one is immediately reminded of the trackless maze of "proximate" cause questions in the law of Torts. The words are not capable of precise definition and it is likely they were not meant to be. Here was left an area for courts to deal with sets of facts as they arose and to give an interpretation which would not push the act so far as to encounter constitutional difficulties.

The plaintiff urges that an employee's occupation closely and substantially affects interstate commerce if that employee's activities are such that without it interstate commerce would stop or be interrupted. From that

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Laughlin Steel Corporation [301 U.S. 1, 37 (1937)]; in the Bituminous Coal Conservation Act of 1935, in connection with N.R.A. Codes, and in Carter versus Carter Coal Co. [298 U.S. 238 (1936)], and others. . . ." *Hearings, supra* note 8, at 58, 64.

Another noteworthy change in the original bill occurred during the Senate hearings. The first proposal would have included within the coverage of the statute "Any employee . . . whose duties . . . shall be in any degree incidental [to interstate commerce] . . ." *Hearings, supra* note 8, at 2. This clause, which might well have extended the applicability of the statute beyond the "directly or closely and substantially affect" phrase, was eliminated from the final bill, apparently because of the constitutional difficulties thought to be involved. See *Hearings, supra* note 8, at 64.

13 In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court held constitutional a statute which on its face covers activities merely "affecting" interstate commerce.

14 See note 12 *supra*.

it is argued that if Miss Reed failed to bring an ordered tracing from the file to the blueprint maker, the print for the locomotive wheel would not get to the machine shop; if it did not get to the machine shop, the repairs would not be made; if the repairs were not made, the locomotive or car could not run. If the locomotive or car could not run, interstate commerce would be, to that extent, interrupted. And if enough such omissions occurred, transportation on the great Pennsylvania system would grind to a dismal halt. Now of course that is true. But it is equally true that if the messenger boy who was supposed to pick up the letters containing the blueprints, addressed to the various shops throughout the railroad system, failed to pick them up and mail them, the same thing would happen. One is reminded of the old rhyme "for want of a nail the shoe was lost" and its dire chain of catastrophe.

We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact. We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Company*, 220 F.2d 177, 183 (3rd Cir. 1955), that we had a "borderline" case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here.[15]

As we remarked in *Shaw v. Monessen Southwestern Ry. Co.*, 200 F.2d 841, 844 (3rd Cir. 1953), we should be careful not to extend this statute too far. If a plaintiff can prove negligence he may be better off than he would be under workmen's compensation law. But if he cannot, he gets nothing. *Cf.* PA. STAT. ANN. tit. 77, § 431, § 461 (1952). The hardship of denying recovery to one who was injured

15 *Cf.* Holt v. Southern Pac. Co., 71 F. Supp. 21 (N.D. Cal. 1947), where it was held that the act did not cover a clerk filling out forms in a freight claims department.

but who cannot show the required lack of care on the part of the employer is readily apparent.

We think both from the legislative history and the course of decision that we should not extend the application of the statute to cover this case.[16]

The decision of the district court will be affirmed.

BIGGS, *Chief Judge*, dissenting.

The plaintiff was employed in a department of the defendant Railroad where approximately 325,000 original tracings are on file. These tracings are master prints which cover "all mechanical equipment, cars, locomotives, trains, etc., and all types of structures including bridges, trackage, etc." used or maintained on the defendant's interstate system. Blueprints are made from the master prints. It was the duty of the plaintiff from time to time, to remove master prints from the files, take them to another employee who would blueprint them, and return them to the files. The blueprints would then be sent to various points.

The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of em-

16 We do not see that the citation of cases on the application of the Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201-219 (1952), is helpful. The test there is whether an employee is engaged in commerce or in the production of goods for commerce. Cases cited by appellant, *e.g.*, Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946), involve the admittedly extensive phrase, production of goods for commerce, quite a different question from what we have here. In Overstreet v. North Shore Corp., 318 U.S. 125 (1943), the Court held that, when construing the "engaged in commerce" clause under the Fair Labor Standards Act, cases interpreting its counterpart under the Federal Employers' Liability Act, before the 1939 amendment, were helpful. Contrary to appellant's suggestion, we are not required by this holding, when construing the amended Liability Act, to give weight to cases interpreting "the production of goods" phrase under the Fair Labor Standards Act.

ployees' positions as affecting transportation. Such an interpretation does not seem to be in accordance with the 1939 amendment to the Federal Employers' Liability Act, 45 USCA § 51, 53 Stat. 1404. The duties of the plaintiff, like those of everyone else employed in the same department, furthered interstate commerce. It should be noted that a disjunctive "or" follows the first semi-colon of the amendment and, if the statute be read literally, as I think it must, furtherance of interstate commerce suffices to bring an employee within the purview of the amendment: it is not necessary that that employment "directly or closely and substantially" affect interstate commerce. As was pointed out by the Superior Court of Pennsylvania, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605 (1944), the amending language "is very comprehensive, so inclusive indeed that most railroad employees come within its scope." Such a result may be unfortunate but seems to have been the intention of Congress.

I would reverse the judgment of the court below.